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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

MICHAEL PAUL MCILVANE,
Petitioner,

-VS-

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No 79-5045

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Michael Paul McIlvane, by his attorney, Carl Ziemba, respectfully prays this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the case of *United States of America*, plaintiff-appellee v *Michael Paul McIlvane*, defendant-appellant, No 79-5045, to review the Order filed on date of October 19, 1979, affirming the judgment of the district court upon petitioner's conviction for conspiracy to manufacture a controlled substance.

ORDERS BELOW

The Court of Appeals did not issue an opinion. The Court of Appeals issued an Order filed on date of October 19, 1979. The Order is unpublished. It is appended hereto as Appendix 'A'.

Petitioner's petition for rehearing and suggestion for rehearing *en banc* in the Court of Appeals was denied by that Court by Order filed under date of November 19, 1979. This Order is unpublished. It is appended hereto as Appendix 'B'.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the judgment of the district court was filed on date of October 19, 1979.

Petitioner's petition in the Court of Appeals for rehearing and suggestion for rehearing *en banc* was denied by Order filed on date of November 19, 1979.

The jurisdiction of this Court is invoked under 28 USC. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.'

QUESTION PRESENTED

Whether a defendant in a criminal case who does not testify on trial is deprived of his right of confrontation under the Sixth Amendment to the United States Constitution when the confession of his codefendant is introduced into evidence *after* the codefendant has testified and when the codefendant in his testimony denied having made the statements attributed to him in the said confession.

STATEMENT OF PERTINENT FACTS

Petitioner and one Alfred Ruckstahl were charged in a one count indictment with having conspired together and with one Michael Thomas, who was not indicted, to unlawfully manufacture phencyclidine, a controlled substance, contrary to 21 USC. 841(a)(1) and 21 USC. 846.

The case was tried to a jury.

Evidence was adduced by the prosecution which, when construed in the light most favorable to the prosecution and if believed by the jury, was sufficient to support the jury verdict of guilty against petitioner. The most damaging testimony was given by the unindicted co-conspirator whose credibility was undermined by the consideration extended to him by the prosecution for his testimony. Some corroboration of the unindicted co-conspirator could be found in the fact that government agents seized from petitioner's home allegedly some chemical precursors of phencyclidine. However, when the jury during deliberations asked to see the receipt claimed by the government to have been given to petitioner upon the seizure of these chemicals, the jury was told that the government had not introduced such receipt into evidence.

Petitioner did not testify on trial; his codefendant did.

In his testimony, the codefendant affirmatively exonerated himself; he did not exonerate petitioner in his testimony. No confession of the codefendant was offered and introduced into evidence by the prosecution prior to the codefendant's taking the stand to testify.

The codefendant made no reference whatever to any statement or confession of his during his testimony given on direct examination. On cross-examination by Government counsel, codefendant was asked the following questions.

Q. (By Mr. Parker continuing) Mr. Ruckstahl, during the last half of December of 1976, did you have a discussion with

Mike McIlvane about some sort of cover story of legitimate products that might be made with the same chemicals that you could use to make a drug?

A. Not to my knowledge, no. (IVIII)[0]

* * *

Q. (By Mr. Parker, continuing) Mr. Ruckstahl, I asked you a question: Didn't you tell Agent Rick Fling on January 14, 1977, that you told Michael McIlvane you could make PCP?

A. No.

Q. Didn't you tell Agent Fling that day that you had prepared a list necessary to make PCP?

A. No.

Q. Didn't you tell Agent Fling that you went to the Wayne State Medical Library to perfect the formula for PCP?

A. Not to protect the formula.

THE COURT: Not to what?

A. Or not to perfect the formula. I went down there, well, first of all, at Thomas' instructions and then for my own knowledge.

Q. (By Mr. Parker, continuing) Didn't you tell Agent Fling that you called Sargent-Welch regarding a defective stirring motor?

A. Probably did.

MR. PARKER: I have no further questions, . . . (IV121)

Petitioner objected at the beginning of the above cross-examination. Government counsel in reply to the objection announced that he would call Agent Fling in rebuttal to testify as to statements made to Agent Fling by codefendant and asked the trial judge to instruct the jury that the statements made to Agent Fling by codefendant were evidence only against the codefendant and were not evidence against petitioner (IV113).

[0] The roman numerals in the parentheses refer to the volume of the transcript of testimony adduced on trial of this case; the arabic, to the pages within.

Petitioner did not cross-examine his codefendant.

The prosecution called Agent Fling in rebuttal after both petitioner and his codefendant had rested. Agent Fling testified on direct examination as follows:

Q. [By Mr. Parker]: What did he [codefendant] tell you.

A. [By Flint]: He stated that he knew Mr. McIlvane for some period of time and that he had recently bragged to him that he had the knowledge and the capability to manufacture phencyclidine. After he told him this, he said that he was introduced to another person, Mr. Michael Thomas, by Mr. McIlvane.

Q. By "he" you mean Mr. Ruckstahl.

A. Yes, Mr. Ruckstahl was introduced to Mr. Thomas by Mr. McIlvane. Mr. Ruckstahl was told that Mr. Thomas had the money and the capabilities to order chemicals and precursors necessary to produce phencyclidine.

Q. Did he say anything else?

A. He said that—Mr. Ruckstahl stated that he had given a list of chemicals and equipment that were needed to manufacture the phencyclidine to Mr. Thomas and Mr. McIlvane and that at some period after he had given them the list he had seen equipment and chemicals at both Mr. Thomas' house and at Mr. McIlvane's house.

Q. Was that the end of his statement or did he say anything else?

A. No. He also stated that he had made at least one, I believe more than one trip to the Wayne State Medical Library for the purpose of corroborating the formula he had.

MR. PARKER: I have no further questions, your Honor. (IV131-132)

Petitioner did not cross-examine Agent Fling.

Neither petitioner nor his codefendant offered any surrebuttal testimony.

The jury returned verdicts of guilty against both petitioner and his codefendant and the court sentenced petitioner and his codefendant to a term in prison.

REASONS FOR GRANTING THE WRIT

The confession of the codefendant which implicated petitioner was not introduced by the Government into evidence as part of the Government's case in chief.

And when the codefendant was testifying under direct examination by his counsel, he did not mention a word concerning his confession.

Hence, at this point, counsel for petitioner could not cross-examine the codefendant on his confession because the record was entirely devoid of any testimony or evidence of a confession by codefendant.

Government counsel in his cross-examination of the codefendant imputed to the codefendant in his questions certain statements criminative of the codefendant and of petitioner. The codefendant denied having made the statements imputed to him in the questions posed to him by Government counsel.

Thus, at the conclusion of cross-examination of the codefendant by Government counsel there was no substantive evidence in the record of any confession made by the codefendant because, surely, the imputations in the questions by Government counsel to the codefendant were not substantive evidence. Hence, there was no confession of the codefendant in the record about which counsel for petitioner could cross-examine the codefendant.

When the Government called Agent Fling in the Government's case in rebuttal, the testimony given by Agent Fling merely *impeached* the testimony of the codefendant.

But even assuming *arguendo* that the rebuttal testimony of Agent Fling was substantive evidence of the codefendant's confession, the codefendant was no longer available for cross-examination and any cross-examination of the Agent Fling could not substitute for a cross-examination of the codefendant on the subject of his confession.

Therefore, petitioner was deprived of his right under the Confrontation Clause of the Sixth Amendment to United States Constitution to cross-examine his codefendant on his alleged confession.

The error committed in the case at bar is the same error committed in *Bruton* v *United States*, 391 US 123, 127-128 (1968):

> 'Plainly, the introduction of [the codefendant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the codefendant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation.'

In the case at bar, the codefendant did take the witness stand but at the time he was on the stand, his confession was not in evidence. Therefore, the codefendant could not be cross-examined *on his confession*. When codefendant's confession was introduced into evidence, the codefendant was no longer available for cross-examination.

It might be argued that petitioner could have cross-examined the codefendant on the portion of his confession imputed to codefendant by the questions of Government's counsel to him. But the questions and the imputations therein contained were not substantive evidence. And at that point petitioner could not be sure that the Government *would* introduce codefendant's confession through Agent Fling even though Government's counsel said he would do this nor that Agent Fling would testify as expected by Government's counsel. Thus, at the time codefendant was on the stand there was nothing of substance in the record which was damaging to petitioner. Had petitioner's counsel elicited testimony from codefendant damaging to petitioner's case at this point, he would have been chargeable as ineffective. *Beasley* v *United States*, 491 F2d 687 (CA6 1974).

It is clear that '[c]onfrontation means more than being allowed to confront the witness physically'. *Davis* v *Alaska*, 415 US 308, 315 (1974).

In *Davis*, it must be remembered, the defendant on trial had full cross-examination of the juvenile witness save on the subject of 'possible bias deriving from the witness' probationary status as juvenile delinquent'. This Court held that the defendant in that case had been denied his rights under the Confrontation Clause.

In other words, the Confrontation Clause assures the right to full and effective cross-examination. There was no full and effective cross-examination in *Davis* because no trial court prohibited defendant's counsel from going into the subject of the witness' juvenile status; in the case at bar, petitioner did not have full and effective cross-examination of codefendant because when codefendant was available for cross-examination, his confession was not available as a *subject for cross-examination*.

This was made clear by this Court in *Nelson* v *O'Neil*, 402 US 622, 627 (1971):

> 'The Constitution as construed in *Bruton*, in other words, is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for "full and effective" cross-examination.' [Emphasis by the Court.]

The factual situtation in the case at bar is entirely different from that in *Nelson* v *O'Neil, supra*. In that case a police officer had testified to the confession made by the codefendant *before* the codefendant took the witness stand, defendant and codefendant as a defense 'told the same story' as to where they were when the crime was committed, and the codefendant 'testif[ied] favorably to the defendant'. 402 US at 624 and 629.

In the case at bar, codefendant's confession was testified to by Agent Fling *after* codefendant had testified, the defenses of petitioner and codefendant were not the same, and the codefendant did not testify favorably to petitioner, except in the sense that he said nothing damaging to petitioner.

In *Douglas* v *Alabama*, 380 US 415, 419 (1965), this Court said that a witness 'could not be cross-examined on a statement imputed to but not admitted by him'. But in *Nelson* v *O'Neil*, 402 US 622, 627 (1971), this Court said that '[o]f course, a witness *can* be cross-examined concerning a statement not "affirmed" by him'. [Emphasis by the Court.]

But surely whichever view is correct, the statement, whether affirmed by the witness or not, in order to properly be the subject of cross-examination *must be in evidence* at the time the witness is available for cross-examination.

CONCLUSION

It is respectfully submitted that for the reasons above given, the Order of the Court of Appeals for the Sixth Circuit affirming the judgment of the district court is in conflict with the requirements of the Sixth Amendment to the United States Constitution and petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,
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Detroit, Michigan
December 3, 1979

APPENDIX 'A'

[Filed October 19, 1979]
NO. 79-5045

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

The defendant appeals from his jury conviction for conspiracy to manufacture a controlled substance, phencyclidine (P.C.P.) in violation of 21 USC. §§ 841(a)(1) and 846. He makes three arguments on appeal, two of which concern the same occurrence during trial.

The first two arguments arose out of the fact that a co-defendant, while testifying under cross-examination, denied that he had made a statement to a government agent which amounted to a confession. When counsel for the defendant objected to questions concerning the co-defendant's statement, counsel for the government advised him that the government would introduce the agent to whom the statement was made. Thereafter counsel for the defendant declined to cross-examined the co-defendant. After both defendants had rested their cases, the defendant McIlvane not having taken the stand, the government called as a rebuttal witness the agent who testified that the co-defendant had confessed his part in the conspiracy to the agent and implicated the defendant. On appeal the defendant contends that his Sixth Amendment right to confrontation was violated by the introduction of evidence of his co-defendant's confession and that his Fifth Amendment due process rights were violated by the district court's permitting the government to introduce the confession of the co-defendant in rebuttal after it had failed to do so during its case in chief.

We find no violation of the right to confrontation. The co-defendant whose statement was introduced was present

and actually on the witness stand when the matter arose. The defendant declined to cross-examine his co-defendant at that time and did not request the court to defer his cross-examination until after the agent had testified concerning the contents of the confession. The presence and availability of the co-defendant for cross-examination removes this case from the rule of *Bruton* v *United States*, 391 US 123 (1968). Extra-judicial statements may be introduced without violating the right of confrontation if the declarant testifies as a witness and is available for cross-examination. *California* v *Green*, 399 US 149 (1970). In the present case the district court instructed the jury that evidence of the co-defendant's statement was to be considered only insofar as it affected the co-defendant and was not to be considered as evidence in the trial of the defendant-appellant McIlvane.

We find no abuse of discretion or infringement of due process rights of the defendant in the ruling of the district court that the confession of the co-defendant could be introduced as rebuttal evidence. During its case in chief the government had no way of knowing whether the co-defendant would take the stand and it would have risked a *Bruton* violation by introducing a confession at that time. After the co-defendant voluntarily took the stand and denied giving the confession to the agent, the agent's testimony was proper rebuttal.

The third assignment of error relates to the court's instructions to the jury. It is argued that the district court committed reversible error in failing to instruct the jury that it could base a finding of reasonable doubt on lack of evidence. Though it is not clear from the record that the appellant properly preserved this issue, our examination of the entire charge to the jury convinces us that there was no error in the instructions on reasonable doubt.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

Appendix 'B'

APPENDIX 'B'

ORDER
[Filed November 19, 1979]
NO. 79-5045

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

No judge in active service on the court having requested en banc consideration, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the appeal.

Upon consideration the court concludes that the issues raised in the petition for rehearing were fully considered and decided upon the original submission of this appeal.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, *Clerk*
By: (s) GRACE KELLER
Deputy Clerk